

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TERRY L. BERG and JENNIFER L. BERG,

Plaintiffs/Counter-Defendants-  
Appellees,

v

RICHARD N. BINDER, RICHARD N. BINDER  
BUILDING & REMODELING COMPANY,  
L.L.C., RICHARD N. BINDER BUILDING  
COMPANY, ROB'N WOOD HOME CARE,  
INC., JERRY ZABEL ELECTRIC COMPANY,  
INC., SUPPLY NORTH CENTRAL GROUP,  
INC., AMERICAN AIR CONTROL, INC.,  
CUSTOM QUALITY WOODWORKS, INC.,  
ROGAN & SON ROLLOFF SERVICES, INC.,  
a/k/a ROGAN ROLLOFF SERVICE, INC.,  
SMEDE-SON STEEL AND SUPPLY  
COMPANY, STANDARD DRYWALL, INC., C  
AND C WINDOW, J & J TILE AND MARBLE  
COMPANY, INC., HARPER CEMENT AND  
CONSTRUCTION COMPANY, HARRIS C.  
KATZMAN, JOHN G. HARTE, d/b/a REDD &  
HARTE, and KEVIN A. NAGLE,

Defendants/Cross-Defendants,

and

FINISHED CARPENTRY PRODUCTS, L.L.C.,

Defendant/Cross-Defendant-  
Appellant,

and

VITEX, INC., and SCHWARTZ PLUMBING  
INCORPORATED,

UNPUBLISHED

June 12, 2008

No. 275894

Oakland Circuit Court

LC No. 2003-047452-CK

Defendants/Counter-  
Plaintiffs/Cross-Plaintiffs/Cross-  
Defendants,

and

NORTHWEST INDUSTRIES, INC.,

Defendant/Counter-Plaintiff/Cross-  
Plaintiff/Cross-Defendant/Third-  
Party Plaintiff,

and

FIRST FEDERAL OF MICHIGAN, d/b/a  
CHARTER ONE BANK, F.S.B., and  
HOMEOWNERS CONSTRUCTION LIEN  
RECOVERY FUND,

Third-Party Defendants.

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Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant Finished Carpentry Products, L.L.C. (“defendant”) appeals as of right from an order denying its motion to set aside a default judgment obtained by plaintiffs Terry and Jennifer Berg. We reverse and remand for further proceedings.

As a preliminary matter, we reject plaintiffs’ argument that this Court lacks jurisdiction over this appeal because the trial court’s January 11, 2007, order dismissing Schwartz Plumbing’s cross-complaint was entered nunc pro tunc to June 22, 2006. It is undisputed that defendant timely filed this appeal from the January 11, 2007, order. The fact that the January 11, 2007, order was entered nunc pro tunc to June 22, 2006, did not change its character as a final order as defined in MCR 7.202(6)(a)(i). Until the January 11, 2007, order was entered, there was no final order within the meaning of the court rule, and defendant could not have properly filed a claim of appeal, because no order resolving Schwartz Plumbing’s cross claims had been entered. The January 11, 2007, order was the first order to resolve those claims, regardless of whether it was entered nunc pro tunc to an earlier date. Because defendant timely filed a claim of appeal

from the January 11, 2007, order, this Court has jurisdiction over this appeal. MCR 7.204(A)(1)(a).<sup>1</sup>

Turning to the merits of defendant's appeal, we agree that the trial court erred in determining that its prior decision denying defendant's motion to set aside the entry of a default was dispositive of defendant's later motion to set aside the subsequently entered default judgment, where the later motion was based on a different ground, lack of notice, that did not exist when the earlier motion was decided.

Although public policy generally favors the determination of issues on their merits, the decision whether to set aside an entry of default or a default judgment is committed to the trial court's discretion and will not be set aside absent a clear abuse of that discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-229; 600 NW2d 638 (1999). An abuse of discretion occurs only when the trial court's decision is outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). This Court may not substitute its judgment for that of the trial court. *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94-95; 666 NW2d 623 (2003); *Alken-Ziegler, supra* at 228.

Regarding the procedure for setting aside a default or a default judgment, MCR 2.603(D) states:

(1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

(2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may be set aside only if the motion is filed

(a) before entry of a default judgment, or

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<sup>1</sup> We also note that the January 11, 2007, order appears to have been improperly entered nunc pro tunc to June 22, 2006. "An entry nunc pro tunc is proper to supply an omission in the record of action really had, but omitted through inadvertence or mistake." *Shifferd v Gholston*, 184 Mich App 240, 243; 457 NW2d 58 (1990). An order nunc pro tunc is "an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake." *Safie Enterprises, Inc v Nationwide Mut Fire Ins Co*, 146 Mich App 483, 492; 381 NW2d 747 (1985), quoting *Mallory v Ward Baking Co*, 270 Mich 91, 93; 258 NW 414 (1935). In the present case, there was no claim that the trial court had previously dismissed Schwartz Plumbing's cross claims but failed to enter an order reflecting this action. Rather, the cross claims were never previously litigated; they were not dismissed by action of the court until entry of the January 11, 2007, order. Thus, the January 2007 order could not be made retroactive, nunc pro tunc, to June 2006, to give force to something that was never in fact done at that time.

(b) if a default judgment has been entered, within 21 days after the default judgment was entered.

(3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612.

(4) An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

In this case, the trial court explained that it was denying defendant's motion to set aside the default judgment because it had previously denied defendant's earlier motion to set aside the entry of a default. The court stated:

I already denied the motion. It was not without prejudice, so, therefore, this motion can't really be brought. Denied again.

As defendant argues, entry of a default and entry of a default judgment are two different events. In *Perry v Perry*, 176 Mich App 762, 767; 440 NW2d 93 (1989), this Court explained the distinction between the default and the default judgment and the importance of notice:

The purpose of the notice requirement is to apprise the defaulting party of the possibility of entry of judgment so that he may have an opportunity to participate in any hearing necessary to ascertain the amount of damages or other form of remedy to be granted. This purpose is premised on the distinction between the entry of default and the entry of judgment. The former operates as an admission by the defaulting party that there are no issues of liability, but leaves the issues of damages unresolved until entry of judgment. The latter reduces the default to a judgment for money damages. Once a valid default is taken, the defaulting party remains entitled to full participatory rights in any hearing necessary for the adjudication of damages. [Internal citations omitted.]

Nothing in the court rule makes a denial of a motion to set aside an entry of a default dispositive of a separate motion to set aside a default judgment. Further, defendant's motion to set aside the default judgment was not based on the same grounds asserted in its earlier motion to set aside the entry of a default, but rather on a new ground, i.e., lack of notice of plaintiff's motion for entry of a default judgment.

Nonetheless, reversal would not be appropriate "unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). In this case, it is not apparent that defendant lacks either good cause or a meritorious defense, such that setting aside the default judgment would not be justified.

A substantial irregularity or defect in the proceeding upon which a default or default judgment is based may constitute good cause to set aside a default judgment. See *Alken-Ziegler*, *supra* at 233. In this case, defendant alleges that it was not provided with notice of plaintiff's

motion for entry of a default judgment. We agree that defendant was entitled to notice of plaintiffs' motion for entry of a default judgment.<sup>2</sup>

MCR 2.603(B)(1)(a) provides:

A party requesting a default judgment must give notice of the request to the defaulted party, if

(i) the party against whom the default judgment is sought has appeared in the action;

(ii) the request for entry of a default judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or

(iii) the pleadings do not state a specific amount demanded.

In the present case, defendant had filed an appearance under MCR 2.117, and plaintiffs' complaint did not state a specific amount of damages demanded against this particular defendant. Therefore, notice of plaintiffs' motion for a default judgment was required, and defendant can satisfy the good-cause requirement if it can establish that it did not receive the appropriate notice of plaintiff's motion for entry of a default judgment. The trial court did not address whether plaintiffs pursued the default judgment in an appropriate manner. See MCR 2.603(B)(1), (2), and (3). Further, the trial court did not address whether there was sufficient notice of a request for entry of default judgment. See MCR 2.603(B)(1)(b) and MCR 2.603(B)(3).<sup>3</sup> Accordingly, on remand, the trial court must address the propriety of the fulfillment of the notice provision of the court rule. See *Perry, supra* at 771 (holding that the trial court abused its discretion by failing to set aside the default judgment when the plaintiff failed to provide the proper notice.).

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<sup>2</sup> We note that plaintiffs assert that they provided defendant with the appropriate notice and attach a copy of a motion for entry of default judgment. The court rules provide for three ways to obtain entry of a default judgment. MCR 2.603(B)(1), (2), and (3). Because defendant had appeared in the action, plaintiff was required to follow MCR 2.603(B)(1)(a) first. That is, plaintiffs were required to file a notice at least 7 days before entry of the requested default judgment, MCR 2.603(B)(1)(b). It appears that plaintiffs never filed the requested notice required by MCR 2.603(B)(1), but proceeded to seek entry based on MCR 2.603(B)(3) submitted with a notice of *hearing* only.

<sup>3</sup> Plaintiffs assert that it is apparent that defendant had notice of their motion for entry of a default judgment because the motion was mentioned in their May 10, 2004, case evaluation summary filed in defendant's related lien case, which should have prompted defendant to investigate. At the hearing on defendant's motion to set aside the default judgment, however, defendant also denied receiving plaintiffs' May 10, 2004, case evaluation summary and claimed that it instead relied on a case evaluation summary that was previously filed in February 2004. We note that plaintiffs failed to address the type of notice required by MCR 2.603(B)(1) before a motion for entry before the court was filed, MCR 2.603(B)(3).

Additionally, defendant had previously filed an affidavit of meritorious defense with its motion to set aside the default.<sup>4</sup> The affidavit addressed the merits of plaintiffs' complaint and averred that defendant had provided good quality materials for plaintiffs' project, that the materials were fit for their intended use, that it was not paid in full for the materials, that it properly filed a construction lien against plaintiffs' property and wished to foreclose on the lien, and that it did not have a contractual relationship with plaintiffs, made no representations to plaintiffs, and did not convert any of plaintiffs' property. The only new issue that arose after the affidavit was filed was whether defendant was served with notice of plaintiffs' motion for entry of a default judgment. However, that issue goes to the requirement of good cause, not to the requirement of a meritorious defense.

Further, if the default judgment is set aside, defendant would be entitled to participate in proceedings to determine damages.

MCR 2.603(B)(3)(b) states:

If, in order for the court to enter a default judgment or to carry it into effect, it is necessary to

- (i) take an account,
- (ii) determine the amount of damages,
- (iii) establish the truth of an allegation by evidence, or
- (iv) investigate any other matter,

the court may conduct hearings or order references it deems necessary and proper, and shall accord a right of trial by jury to the parties to the extent required by the constitution.

As defendant observes, although the entry of a default settles the issue of liability, "a defendant has the right to participate where further proceedings are necessary to determine the amount of damages." *Midwest Mental Health Clinic, PC v Blue Cross & Blue Shield of Michigan*, 119 Mich App 671, 675; 326 NW2d 599 (1982); see also *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000).

In this case, plaintiffs' complaint does not state a particular amount of damages allegedly attributable to this particular defendant. At the hearing on plaintiffs' motion for entry of a default judgment, the trial court made no inquiry into the basis for plaintiffs' claim of damages. Rather, plaintiffs asked that it be awarded damages in the amount of defendant's construction

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<sup>4</sup> The trial court denied defendant's motion to set aside the default, not because it determined that defendant had failed to show a meritorious defense, but because of defendant's delay in moving to set aside the default, a factor applicable only to the good-cause requirement.

lien, which the trial court awarded. However, paragraph 23 of plaintiffs' complaint alleged that defendant filed this lien because it was not paid in full by the general contractor for the materials that defendant supplied for the job. Thus, it appears that not only was defendant not paid in full, but plaintiffs recovered damages for the amount that defendant was owed. There was no showing that this amount reflected any actual damages to plaintiffs.

On remand, if the default judgment is set aside, defendant is entitled to participate in any proceedings under MCR 2.603(B)(3)(b) to determine damages.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Stephen L. Borrello